BEFORE THE FRESHWATER HEARINGS PANEL

UNDER THE Resource Management Act 1991

AND

IN THE MATTER of submissions on the Proposed Otago Regional Policy Statement 2021: Freshwater Planning Instrument

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LEGAL SUBMISSIONS ON BEHALF OF OCEANA GOLD (NEW ZEALAND) LIMITED

Dated 31 August 2023

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION

1. These submissions are presented on behalf of Oceana Gold (New Zealand) Limited (**OceanaGold**). Some of the themes in these submissions and in the evidence provided on behalf of OceanaGold will be familiar to the Commissioners because it is similar to what OceanaGold has already said in relation to the non-freshwater aspects of the PORPS as they relate to the regionally and nationally important Macraes Mine. The employment opportunities afforded by the mine, the economic significance of the mine, the need to provide a consenting pathway to address situations where development of the mineral resource cannot avoid adverse effects on other important values, and concerns about inflexible implementation of policies meaning the mine can no longer operate will not be new to you. Some of the evidence and matters raised relate exclusively to the freshwater provisions – for example the importance of freshwater to the mine and the mine's interaction with freshwater were not emphasised in the previous hearing but are nonetheless a vital part of the picture in ensuring the mine can continue to operate.
2. In these submissions I:
    a. Provide further background on OceanaGold's operations at Macraes.
    b. Discuss the mining operations at Macraes and highlight the ways in which OceanaGold's operations interact with freshwater;
    c. Discuss the National Policy Statement for Freshwater Management concept of Te Mana o te Wai;
    d. Summarise the key policies which OceanaGold has submitted on; and
    e. Discuss the National Policy Statement on Indigenous Biodiversity (**NPS-IB**).

BACKGROUND TO MINING AT MACRAES

3. Macraes Mine has been operating since the 1990s and the Macraes goldfield is a world class mineral resource[1]. It is a long-standing and regionally significant industry, providing significant employment, economic and social benefits for the district and the Otago region[2]. In 2021 OceanaGold directly employed over 600 people in the Waitaki District and Otago region and paid $61 million in wages[3]. This makes it a large economic entity when viewed on a national scale and it injects $122.7 million into the Otago Region and supports 1,132 jobs directly and indirectly[4]. Macraes Mine and the people working there are part of the local community. In addition to monetary contributions to schools and community organisations, employees and their families are part of the social fabric of the area and attend local schools, are members of community groups and teams and form the Macraes Emergency Response Team[5].
4. A further benefit of the long-running mining operations is the accumulated wealth of knowledge associated with the site, both in understanding the terrestrial and aquatic environment and the effects of mining. There are over 150 monitoring sites at Macraes, comprising a mixture of compliance sites and monitoring which OceanaGold undertakes itself.[6] As Dr Greg Ryder was going to be overseas at the time of the hearing, he has prepared a report on the aquatic ecology of the area

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[1] Evidence of Debbie Clarke at paragraph [7].

[2] See evidence of Shamubeel Eaqub.

[3] Evidence of Alison Paul at paragraph [21].

[4] Evidence of Shamubeel Eaqub at paragraph [4.4].

[5] Evidence of Alison Paul at paragraph [23].

[6] Evidence of Debbie Clarke at paragraph [25].

and this is attached to Ms Clarke's evidence. Dr Ryder is a well-known and respected senior aquatic ecologist. He notes that he first began visiting the Macraes area in the 1980's as part of his PhD work before undertaking monitoring work for the mine in the 1990's. Dr Ryder notes that "*The freshwater ecology monitoring programme at the Macraes Mine area is probably the most extensive and long-term of its kind in Otago and Southland, and possibly the South Island …*"[7]. This rich knowledge of the area and long history of monitoring enables us to look at longer term trends, not just short-term data which can be affected by extreme weather events. I will discuss the points made by Dr Ryder in more detail shortly.

IMPORTANCE OF FRESHWATER

5. In my opening submissions on the non-freshwater parts of the PORPS I said "*The functional needs of modern mining are such that where important mineral deposits co-locate with these vegetation remnants the loss of that vegetation often cannot be avoided when mining development proceeds*"[8]. In much the same way as the ore often intersects with areas of high biodiversity value, naturally occurring surface and groundwater frequently co-locates with important mineral resources, and in many cases explains why the minerals are found where they are[9]. As Ms Paul says in her evidence "*interaction with freshwater is a key and unavoidable part of mining at Macraes*"[10].

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[7] Report by Dr Ryder at paragraph [1.6]. The Report is Appendix 1 to the evidence of Debbie Clarke.

[8] Opening submissions on behalf of Oceana Gold dated 23 January 2023 at paragraph [8].

[9] Evidence of Debbie Clarke at paragraph [11].

[10] Evidence of Alison Paul at paragraph [10].

6. The Macraes mine straddles catchments that drain into the Shag/Waihemo River, Taieri River and Waikouaiti River, with Deepdell Creek (a tributary of the Shag/Waihemo River) the largest surface water feature in the Macraes area[11].
7. In her evidence Ms Clarke describes the different types of resource consents that OceanaGold holds which are associated with managing freshwater. Using the Golden Point Underground Mine (**GPUG**) as an example, the underground mine workings are up to 300 m deep and there can be groundwater infiltration from the surrounding rock mass. GPUG also requires operational water for machinery cooling, wash down, and shotcrete machines and this operational water is sourced from the Golden Point Pit sump. The mix of groundwater and operational water is kept at a controlled level and is collected in underground sumps, from where it is then pumped to the surface. This water is recycled where possible for use in the processing plant and as a dust suppressant on haul roads, tailings impoundments and other earthworks areas. At closure, the pumping of water from underground mine workings ceases and the tunnels will be left to fill naturally. OceanaGold also discharges water which has been diverted around pits or waste rock stacks, or seepage from waste rock stacks and tailings storage facilities to streams.
8. A second way in which OceanaGold interacts with freshwater is that freshwater is essential for ore processing at the processing plant. In addition to recycling water as much as possible, OceanaGold also has a permit to abstract water from the Taieri River. The water take provides fresh water to a trout hatchery[12], before being

[11] Dr Ryder's Report at paragraphs [1.9 – 1.10].

[12] The trout hatchery is a partnership between OceanaGold and the Otago Fish and Game Council which has been operating for 19 years. The hatchery is the only hatchery in Otago to successfully breed trout stocks for release around Otago and Southland. The partnership with Fish and Game not only supplies trout for stocking in appropriate places, but OceanaGold anf Fish and Game also work together to install trout barriers where native habitats need protection.

stored in the Lone Pine Reservoir. This water from the Reservoir is used to supplement the water needed for the mine (for example drinking water) as well as being used in the processing plant as "make-up water" – the difference between the water required for ore processing and the recycled water that can be supplied. Based on the rate of take, Mr Eaqub has calculated the economic contribution per cubic metre of consented water take for agriculture as $\$0.7/m^3$ and for Macraes $\$42.0\ /m^3$[13]. This demonstrates that within the Otago primary sector, Macraes is a very efficient economic use of water. Its contribution to the regional economy on a per cubic metre basis is significantly higher than the contribution of agriculture.

9. OceanaGold's interactions with freshwater need to be managed so that they do not cause adverse effects on downstream water quality and aquatic ecosystems. It is essential that OceanaGold is able to follow the effects management hierarchy when interacting with freshwater in much the same way as it needs to do when its activities intersect with other important values (such as biodiversity, highly productive land, and historic heritage values) by in the first instance avoiding, then remedying, mitigating and offsetting or compensating for residual adverse effects.
10. Turning to the question of the effects the mine has on freshwater ecology I make the following observations. Mining has unavoidably resulted in the loss of a number of small first order tributaries and associated habitat[14]. Dr Ryder estimates this could be as high as 58 km, with about 17.6 km of stream networks protected through covenants[15]. Dr Ryder notes there is some uncertainty about the exact length of stream loss over the life of the mine due to the lack of record keeping in

[13] Evidence of Shamubeel Eaqub at paragraphs [3.5 and 3.6].

[14] Dr Ryder's Report at paragraph [1.20].

[15] Dr Ryder's Report at paragraph [1.20] and his footnote 3.

the earlier years. I also note that there can be debate between ecologists and hydrologists as to what constitutes a river and where a river commences and this too can lead to discrepancies in calculating stream lengths.

11. The invertebrate communities of Deepdell Creek are generally representative of what is found in other creeks monitored in the area. As Dr Ryder says[16], *"…this is not surprising, given they have similar physical characteristics and drain catchments with similar elevations, climate, land use activities and vegetation cover*."

12. Overall, Dr Ryder has found invertebrate diversity is generally similar between monitoring sites on Deepdell Creek, however those sites downstream of the mine generally have lower diversity than other sites[17]. He postulates that the lower diversity is likely to be influenced by the frequent loss of surface flow downstream however he also says that "*… [lower diversity is likely to be influenced by] some differences in physical habitat, and potential effects associated with farming and mining activities in the upstream catchment. It is difficult to differentiate the effects of mining from other rural land use practices and the influence of local habitat."*[18] In terms of water quality Dr Ryder discusses the findings at the monitoring sites and concludes that "*… the mine has not had any material effect on the water quality of the Shag/Waihemo River, however nitrogen (principally nitrate) is increasing*"[19].

13. The fisheries of the local catchment have been characterised by low species diversity and a dominance by non-migratory indigenous Taieri flathead galaxias

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[16] Dr Ryder's Report at paragraph [1.13].

[17] Dr Ryder's Report at paragraph [1.21].

[18] Dr Ryder's Report at paragraph [1.21].

[19] Dr Ryder's Report at paragraph [1.29].

which has a large population and is resilient to a range of conditions[20]. Taieri flathead galaxias and koura are common in waters within and adjacent to the mine footprint.

14. Dr Ryder concludes "*I have been unable to find any evidence that Macraes mining activities in the headwaters of tributaries of the Shag/Waihemo, Taieri or Waikouaiti rivers are adversely affecting ecological values further downstream.*"[21] In part this is due to the mine's footprint being relatively small compared to the catchment size, and he notes that "*the cumulative effects of the various land use activities in their respective catchments remain the dominant force affecting water quality, hydrology and downstream ecology*."[22] As referred to above, there has been a loss of habitat (including spawning habitat) for the flathead galaxias and koura, however this has been mitigated to some extent by a number of covenants established in similar nearby catchments and the funding of trout barriers in other catchments with at risk roundhead galaxias populations (a species that has a greater threat risk classification than the Taieri flathead galaxias).
15. Dr Ryder notes that he is aware of OceanaGold avoiding adverse effects where possible as well as employing numerous mitigation initiatives. These are set out in his paragraph 1.35 but include protection of tussock grasslands and shrublands which protect surface waters, sediment and erosion management plans, augmentation of flows, and translocation of koura and fish.
16. In my submission Dr Ryder's report confirms that although modern day mining has unavoidably led to a loss in stream length, the mine's overall effect on aquatic

[20] Dr Ryder's Report at paragraph [1.14].

[21] Dr Ryder's Report at paragraph [1.32].

[22] Dr Ryder's Report at paragraph [1.32].

ecology and water quality is small. Invertebrate diversity and fish numbers in Deepdell Creek are similar to what would be expected, although there is reduced invertebrate diversity below the mine. Mine water quality in the Shag/Waihemo does not show any effect attributable to mining although nitrogen is increasing. Dr Ryder notes cumulative effects arising from other land uses in the catchment could account for this change.

TE MANA O TE WAI

17. The national significance of Te Mana o te Wai was mentioned in the National Policy Statement for Freshwater Management (**NPS-FM**) 2014, however it was through the 2017 amendments to the NPS-FM that objective AA1 "*To consider and recognise Te Mana o te Wai in the management of fresh water"* and associated policy AA1, instructing regional councils to consider and recognise Te Mana o te Wai in making or changing RPSs and plans were inserted into the NPS-FM. Even though expressed differently in the 2014 and 2017 versions, and now the 2020 version, "*the centrality of Te Mana o te Wai to freshwater management is a constant*"[23].
18. Further amendments were made and a new NPS-FM released in 2020. The NPS-FM 2020 recognises Te Mana o te Wai as a fundamental concept relevant to freshwater management and it "*must inform the interpretation of the NPS-FM-2020*"[24]. Clause 1.3(1) says:

> *Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the*

[23] *Re Otago Regional Council* [2021] NZEnvC 164 at paragraph [30].

[24] *Re Otago Regional Council* [2021] NZEnvC 164 at paragraph [33].

health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

19. To put it another way, Te Mana o te Wai "*recognises that protecting the health of freshwater protects the health and wellbeing of the wider environment*"[25].
20. Six principles that Te Mana o te Wai is deemed to encompass were also inserted into the NPS-FM, these are[26]:
    a. Mana whakahaere
    b. Kaitiakitanga
    c. Manaakitanga
    d. Governance
    e. Stewardship
    f. Care and respect
21. There is a deemed hierarchy of obligations which says[27]:

    There is a hierarchy of obligations in Te Mana o te Wai that prioritises:

    (a) first, the health and well-being of water bodies and freshwater ecosystems

    (b) second, the health needs of people (such as drinking water)

    (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future

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[25] *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc* [2022] NZHC 1777 at paragraph [18].

[26] Clause 1.3(4) of the NPS-FM

[27] Clause 1.3(5) of the NPS-FM.

22. Although the decision in *Aratiatia Livestock Ltd v Southland Regional Council*[28] concerned the 2017 version of the NPS-FM, the Court's observations "*remain relevant*"[29]:

> *(a) Te Mana o te Wai is not a Māori centric but a water centric approach;*
>
> *(b) while expressed in te reo Māori, Te Mana o te Wai benefits all New Zealanders;*
>
> *(c) Te Mana o te Wai is a concept that requires natural and physical resources be managed in a way that recognises that by protecting the health of freshwater, the health and well-being of the wider environment is also protected. This concept entails a fundamental shift in societal perspectives on sustainable management of fresh water.*

23. The NPS-FM 2020 was considered on judicial review to the High Court in *Muaūpoko Tribal Authority Inc v Minister for Environment*[30]. One ground of review was that the "vegetable exemption"[31] in the NPS-FM was invalid because it breached the definition of sustainable management in section 5 of the RMA. The High Court said[32] "*The concept of Te Mana o te Wai, and the policies and objectives*

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[28] [2020] NZEnvC 93, see paras [6] and [61-64].

[29] *Re Otago Regional Council* [2021] NZEnvC 164 at paragraph [31].

[30] [2022] NZRMA 481 (HC).

[31] Clause 3.33 of the NPS-FM which says that when implementing the NPS in an FMU that is in, or includes, all or part of a specified vegetable growing area, a regional council must have regard to the importance of the contribution of the specified growing area to: (a) the domestic supply of fresh vegetables; and (b) maintaining food security for New Zealanders.

[32] [2022] NZRMA 481 (HC) at paragraph [149].

of the NPS-FM 2020, are said to be decisions which give effect to "sustainable management" in the freshwater context." The High Court went on to say[33]:

> *That structure [of the RMA and the hierarchy of documents] and process recognises that giving effect to Te Mana o te Wai may require localised responses. Different water bodies have different characteristics and require different responses. It is not inconsistent with s 5 to allow those differences to be recognised when the NPS-FM 2020 is implemented at a localised level. Indeed, allowing Te Mana o te Wai to take on a different shape in implementation is consistent with managing the various interests in s 5 at the same time.*

24. The High Court then went on to discuss the balancing of Te Mana o te Wai and the requirement to have regard to the importance of vegetable growing areas under clause 3.33 of the NPS-FM. The High Court did not consider there was an internal inconsistency and even though this balancing may be difficult, it could still be achieved. The Court said[34]:

> *The target attribute states must also be set in a way that gives effect to Te Mana o te Wai and in accordance with the NPS-FM 2020 so as to set an improved attribute state, but it must be done in a way that does not comprise the domestic supply of fresh vegetables and the maintenance of food security. Just where to strike the balance between these competing factors will be for the relevant regional council to decide after following the processes laid down in the NPS-FM 2020 and in the RMA. I do not underestimate the difficulty of*

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[33] [2022] NZRMA 481 (HC) at paragraph [151].

[34] [2022] NZRMA 481 (HC) at paragraph [176].

that task, but at this stage at least, striking that balance does not appear completely unachievable.

25. In its submission OceanaGold has sought guidance on how LF-WAI-P1 will be applied in the Otago region. Some provisions in the NPS-FM instruct regional councils to import specific wording directly into the RPS or regional plan. Clause 3.2 of the NPS-FM specifically recognises that it is for each regional council to engage with communities and tangata whenua "*to determine how Te Mana o Te Wai applies to water bodies and freshwater ecosystems in the region*".
26. I submit that in light of the case law I have just discussed, and looking at the wording of the NPS-FM it is not as simple as reading the priorities as meaning that priority 1 is to be achieved or applied without any regard to priority 2 and priority 3. It is more complex than that.
27. Ms Hunter explains it in her evidence as follows:

I think the latter part of this explanation [in clause 3.1(1) NPS-FM] is important. It is appropriate to recognise that Te Mana o te Wai is about achieving a balance between the different priorities. The three priorities are all "acceptable" outcomes, and, in my view, that is why they each need to be given priority. The ranking ensures that in making decisions the advancing of a lower order priority cannot be pursued in a way that means a higher order priority is no longer being met. That is not the same as saying that a higher order priority can be pursued without consideration of lower order priorities. Were that to happen there would be no 'balance'.

28. This idea of balance is key and echoes the High Court's sentiments in *Muaūpoko Tribal Authority Inc v Minister for Environment*[35] quoted above. The ORC disagrees

[35] [2022] NZRMA 481.

and in its opening submission says that if the idea was to balance or consider, then different wording would have been used instead of the clear wording used[36]. I agree that the words are clear that the health and well-being of water bodies and ecosystems has first priority, but it is the application of these three matters which requires balance. Were that not the case Councils and communities would not be given the task of making choices when implementing the national objectives framework. The way those choices are made will represent the local expression of how the three priorities are to be balanced.

29. I think it is useful to consider how we need to balance these priorities by using an analogy. If I said that I was going to prioritise my health this year over work, it does not mean that I will immediately quit my job. It does not mean that I will spend all my time sleeping, exercising and eating wholesome food and that I will stop doing all other activities. Instead it means that I will make mindful decisions about what work I do. I may reduce the hours I work to allow more time for rest and exercise, or I may work more flexibly in order to have time available to play sport. However I still need to work in order to pay my mortgage and put food on the table and so I need to be more considered about what work I will do in order to afford my bills whilst still having time to do activities which benefit my health. I submit that the same approach applies when considering the three priorities in clause 1.3(5) and the Objective at clause 2.1 of the NPS-FM. When considering the health needs of people, or the ability of people and communities to provide for their social, economic and cultural well-being, regard needs to be had back to the health and well-being of water bodies and freshwater ecosystems. It is up to different regions to decide

[36] ORC opening legal submissions dated 28 August 2023 at paragraphs [101] and [105].

how to best implement Te Mana o te Wai in their region[37]. In some places water quality may be so degraded that more stringent measures are required in order to restore and protect the mauri of the water. In other places, the water quality may ensure the mauri of the water is already protected. As Ms Hunter says in her evidence it is all about balance.

30. What cannot be lost sight of is that on the one hand if our freshwater resources are poorly managed we all lose out – intrinsic values are reduced and so is the ability of freshwater to provide for the needs of people and communities. On the other hand if we lose balance and fail to recognise that all priorities must be provided for, then our freshwater resources may be 'protected', but they will not be managed sustainably, and the needs of people and communities will not be met.

SPECIFIC SUBMISSIONS ON OTHER POLICIES

31. As outlined in Ms Hunter's evidence, Objective LF-FW-O9 and Policy LF-FW-P9 need to be amended to better reflect the 2022 amended versions of the NSP-FM and the National Environmental Standards for Freshwater (**NES-FW**). Most importantly from OceanaGold's perspective is the obligation to acknowledge the consenting pathway for the extraction of minerals where it will provide significant national or regional benefits and the effects are managed through applying the effects management hierarchy[38]. Ms Boyd has suggested amending LF-FW-P9 to implement clauses 3.22 of the NPS-FM, however she insists on using the indigenous biodiversity effects management hierarchy rather the hierarchy in the NPS-FM. In doing so her suggested approach fails to give effect to the NPS-FM

[37] Clause 3.2 of the NPS-FM.

[38] NPS-FM 2022 at clause 3.22.

and is unlawful. Ms Boyd's opinion that a "more stringent approach" is justified in this situation is misplaced and unlawful. The ORC's duty is to give effect to the NPS-FM[39]. Clause 3.1(2)(a) of the NPS-FM says that "*Nothing in this part prevents a local authority adopting more stringent measures than required by this National Policy Statement*". I submit that clause 3.12(2)(a) is still subject to the overriding requirement that the PORPS must give effect to the NPS-FM[40] and clause 3.1(2)(a) must be read in such a way that any more stringent measures do not override the general tenor of the NPS-FM. The requirement to give effect to a NPS is a statutory requirement under the RMA and the NPS-FM, as a subordinate document, cannot override this requirement. Even if there was such an ability it would be entirely inappropriate for such a position to be adopted in the PORPS in light of the considerable work (including rounds of consultation and submissions) that the Ministry for the Environment undertook in developing the 2022 amendments to the NPS-FM and NES-FW. There appears to be no analysis provided that demonstrates why in Otago a different approach is needed than that which applies nationally.

32. One of OceanaGold's overarching concerns with the FPI parts of the PORPS is the absolute nature of some of its requirements. OceanaGold has sought the inclusion of "where it is appropriate and can be practicably achieved" in LF-FW-P10, "to the extent practicable" in LF-LS-P18 and the addition of "improve" to LF-WAI-O1. Good policy writing understands that the real world is complex. Good policy writing preserves the ability for plan writing and resource consent decision making to adopt nuanced and thoughtful positions and outcomes that account for this complexity

[39] Section 62(3) RMA

[40] Section 62(3) RMA.

and which will secure the ability to achieve sensible outcomes for all three priorities in the NPS-FM's Objective.

33. LF-FW-P7A refers to allocating freshwater efficiently to support the social, economic and cultural wellbeing of people and communities including for land-based primary production. In her evidence Ms Hunter has questioned why this does not refer to primary production in general, and this ignores the significance of primary production activities such as mining. As Mr Eaqub notes in his evidence, mining is an efficient use of the consented water take and Macraes is a large economic user in its own right producing significant local benefits[41]. I am aware of no contrary evidence.

34. LF-FW-P16. OceanaGold supports the inclusion of a new policy which deals specifically with discharges containing animal effluent, sewage and industrial and trade waste. In her evidence Ms Hunter has suggested some amendments to improve its application and interpretation. For example, she recommends that the policy should refer to natural water bodies, so that discharges into silt ponds or other intermediary treatment steps are not captured by the policy. I submit the use of silt ponds and other techniques to manage sediment and protect water quality is something which the RPS should be encouraging.

35. One of OceanaGold's concerns is around the active requirement to restore, for example LF-FW-O9 says "*Otago's natural wetlands are protected or restored so that …*" and LF-FW-P10 requires "*the restoration of hydrological processes*" in natural wetlands. Whilst not defined in the Act, restoration implies returning to an original or previous state. Sometimes changes which occur to the landscape through time means that a return to the original state cannot easily be achieved,

[41] Evidence of Shamubeel Eaqub at paragraph [3.6] and [4.2 and 4.3].

especially over the term of the regional policy statement. Also, the nature of the activities at Macraes mean that while the mine is still operational, restoration of some waterbodies cannot occur, and is only achievable as part of mine closure. Often it will be possible to remediate wetlands and provide enhancements, however where the natural wetlands have not been returned to their original state it would not be consistent with policies requiring restoration even if it was still producing good ecological outcomes. Furthermore, these objectives and policies do not properly give effect to the amended NPS-FM which provides a pathway for certain activities, including mining, to occur within natural wetlands[42]. Ms Hunter has suggested amending LF-FW-09 to include "where appropriate" and amending LF-FW-P10 by adding "to the greatest extent practicable"[43].

36. Similarly, policies requiring unobstructed flows in rivers ignores the fact that spawning does not occur in some streams, and that provision for artificial fish passage can still achieve good outcomes. For example OceanaGold submitted on LF-VM-O3 as clause (4) requires fish migration to be achieved via natural migration. As Dr Ryder notes in his report[44]:

> *I do not consider mining operations have affected fish passage. All mining is undertaken in headwaters and generally there is no upstream catchment that fish require access to for spawning or rearing. The major culvert in Deepdell Creek under the haul road to the Coronation Mine was replaced in recent times following a major flood, and was positioned in a manner to enable fish to move up and down it. Notwithstanding that, there are barriers (dams, waterfalls and naturally dry sections) further downstream in Deepdell Creek,*

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[42] Evidence of Claire Hunter at paragraph [42].

[43] Evidence of Claire Hunter at paragraph [58].

[44] Dr Ryder's Report at paragraph [1.32].

Mare Burn and Tipperary Creek that prevent or at least partially restrict upstream fish passage. These, along with periodic dewatering of sections during drought events, have probably been beneficial to the local Taieri flathead galaxias populations in restricting passage and the establishment of local brown trout populations.

37. In her evidence Ms Hunter also comments on LF-FW-O1A which says "*indigenous species can migrate as easily and as naturally as possible*". She notes that "possible" sets a low bar as in a broad sense anything may be possible, however it may not be operationally and/or economically practicable. Ms Hunter has instead suggested saying "*appropriate provision is made for indigenous species to migrate to and from the coastal environment*".

NATIONAL POLICY STATEMENT ON INDIGENOUS BIODIVERSITY

38. The National Policy Statement on Indigenous Biodiversity was gazetted on 7 July 2023. In accordance with this Hearing Panel's 7th Minute, Ms Boyd prepared evidence on behalf of the Otago Regional Council[45] and Ms Hunter prepared supplementary evidence on behalf of OceanaGold[46].
39. In her evidence, Ms Boyd expresses concern that the 2022 amendment to the NPS-FM, in particular the 50% exotic pasture test (the pasture exclusion rule) means that there are number of wetlands that ORC had previously identified as being "natural inland wetlands" which no longer meet the definition in the amended NPS-FM. Ms Boyd is concerned that these wetlands are susceptible to further loss and will not be subject to any specific regulatory controls. Ms Boyd considers that there

[45] Evidence of Felicity Ann Boyd FPI – Implications of the NPSIB dated 11 August 2023.

[46] Supplementary evidence of Claire Hunter regarding the NPSIB 2023, 18 August 2023.

are policies in the NPS-FM which address the health and wellbeing of water bodies (including wetlands) (policy 5) and protecting habitats (policy 9) which need to be give effect to. She therefore wants to amend the PORPS to better protect wetlands which contain 50% or more exotic pasture and therefore do not meet the definition of a 'natural inland wetland'.

40. Accordingly Ms Boyd proposes the following amendments:

    a. Inserting an additional definition of "natural wetland", to which the NPS-FM's pasture exclusion does not apply. This means the PORPS will contain a definition for "natural wetland" and the NPS-FM definition for "natural inland wetland"; and

    b. changes to LF-FW-P9 so that natural wetlands will be protected by "*preventing activities that will, or are likely to, result in irreversible damage to a natural wetland."*

41. In my submission this proposed amendment goes beyond the scope of providing evidence on the "*implications of the NPS IB for freshwater issues*"[47], as Ms Boyd's concerns relates to the amendment to the definition of "natural inland wetland" which had been the subject of consultation by the Ministry for some time and was finalised in December 2022. There has been sufficient opportunity afforded to the ORC to recommend changes if it considered this was justified. Ms Boyd's evidence footnotes the Kai Tahu ki Otago submission as a basis for making the submission. However the summary of submissions does not show Kai Tahu ki Otago seeking this wording.

42. Even if you consider that this late amendment should be considered, it is my submission that is it not appropriate when considered on its merits. The essence

[47] Minute 7 of the Freshwater Hearing Panel dated 21 July 2023 at paragraph [4.1].

of Ms Hunter's supplementary evidence is that extending protection under the PORPS to "natural wetlands" (i.e. those wetlands with 50% or more exotic pasture species which do not meet the NPS-FM definition of "natural inland wetland") so that they must be protected from irreversible damage will probably result in "*unforeseen outcomes and significant constraints*"[48]. "*Preventing activities that will, or are likely to , result in irreversible damage to a natural wetland*" is very broad and will cover a wide range of activities. In proposing this amendment the ORC has not undertaken a detailed section 32AA analysis which evaluates the costs of this policy. Instead Ms Boyd asserts, without reference to any additional evidence, that it may place "*additional restrictions*" which may have arisen under the NPSFM regardless[49]. Ms Boyd does not seek to quantify the cost of these restrictions. Such a comment ignores the years of work undertaken to amend the NPS-FM and NES-FW to fix the problems that had been identified with the implementation of those documents in their original form, and ignores the fact that the Government has made a considered decision to concentrate on wetlands with 50% or less exotic pasture.

43. In its opening submissions, ORC referred to the High Court declaration proceedings test for what is related to freshwater as capturing the "*essence of the NPSFM*"[50]. The ORC says that the freshwater management regime is underpinned by two key propositions being the maintenance or enhancement of freshwater[51]. It is my

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[48] Supplementary evidence of Claire Hunter regarding the NPSIB 2023, 18 August 2023 at paragraph [19].

[49] Evidence of Felicity Ann Boyd FPI – Implications of the NPSIB dated 11 August 2023.

[50] ORC opening legal submissions dated 28 August 2023 at paragraph [7] referring to *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777.

[51] ORC opening legal submissions dated 28 August 2023 at paragraph [7].

submission that the NPS-FM is not quite so absolute. Another key proposition is that the NPS-FM recognises that there are some important activities, including mining, where maintenance of freshwater values may not be possible through avoidance. However, through the careful application of the effects management hierarchy positive overall outcomes for freshwater values can still occur, and in so doing overall sustainable management is achieved by enabling important activities and their associated benefits to proceed while also ensuring good outcomes for important freshwater values.

CONCLUSION

44. OceanaGold's mining operations at Macraes intersect with freshwater, and its operations also include discharges to water and water takes. In order to allow this regionally and nationally important industry to continue the FPI parts of the PORPS need to allow Macraes mine to continue to operate while ensuring that adverse effects are avoided, remedied, mitigated, offset or compensated for as anticipated by the NPS-FM, NES-FW and the NPS-IB.

Dated this 31st day of August 2023

S Christensen/J St John

Counsel for Oceana Gold (New Zealand) Limited